Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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NO. 87-1651

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

COMMONWEALTH OF MASSACHUSETTS,

Petitioner,

v.

DOUGLAS OAKES,

Respondent.

SUPPLEMENTAL APPENDIX

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COMMONWEALTH OF MASSACHUSETTS

WORCESTER, SS.

SUPERIOR COURT
CRIMINAL ACTION
NO. 85-107246

COMMONWEALTH OF MASSACHUSETTS

vs.

DOUGLAS OAKES

MEMORANDUM AND ORDER ON
DEFENDANT'S MOTION TO DISMISS

Background

The defendant is charged with Soliciting a Child to Pose for Pornographic Purposes, in violation of G.L. c. 272, §29A. Through this motion, he seeks to dismiss the indictment, stating as reasons therefore:

1) The indictment, as drawn, fails to include all language set forth in the statute;

2) the most important omission is the word "knowingly";

3) the Commonwealth has added a comma after "state of nudity" and before "or to participate" which does not appear in the statute and which substantially changes the nature of the crime or crimes alleged; and

4) the indictment, as written, fails to state the crime proscribed by G.L. c. 272, §29A.

In his Brief in Support of Motion to Dismiss the defendant argues that: 1) the statute is unconstitutionally vague, ambiguous and overbroad in its construction; 2) that it violates the Fifth Amendment of the United States Constitution as applied to the states through the Fourteenth Amendment because it requires that a defendant speculate as to the meaning of the statute; and 3) that it violates the equal

protection clause of the Fourteenth Amendment.

DISCUSSION

I. Constitutionality of the Statute

In determining the constitutionality of a statute, the courts will "indulge every rational presumption in favor of its validity and 'it will not be denounced as contrary to the constitution unless its language is so clear and explicit as to render impossible any other reasonable construction.'" Commonwealth v. Lammi, 386 Mass. 299, 301 (1982) quoting Commonwealth v. O'Neil, 233 Mass. 535, 540-541 (1919); See also Commonwealth v. Joyce, 382 Mass. 222 (1981); Globe Newspaper Co. v. Superior Court, 379 Mass. 846 (1980).

The language of G.L. c. 272, §29A is clear:

> Whoever with knowledge that a person is a child under eighteen years of age, or whoever while in possession of such facts that he should have reason to know that such person is a child under eighteen years of age, hires, coerces, solicits or entices, employs, procures, uses, causes, encourages or knowingly permits such child to pose or be exhibited in a state of nudity or to participate or engage in any act that depicts, describes or represents sexual conduct for purpose of visual representation or reproduction in any book, magazine, pamphlet, motion picture film, photograph, or picture shall be punished . . . .

The statute thus defines two distinct offenses: 1) with knowledge or reason to know that a child is under eighteen years of age, hiring, coercing, soliciting, enticing, employing, procuring, using, causing, encouraging or knowingly permitting that child to pose or be exhibited in a state of nudity for purpose of visual

representation or reproduction; and 2) with knowledge or reason to know that a child is under eighteen years of age, hiring, coercing, soliciting, enticing, employing, procuring, using, causing, encouraging or knowingly permitting that child to participate or engage in any act that depicts, describes or represents sexual conduct for purpose of visual representation or reproduction.

I find that G.L. c. 272, §29A proscribes clearly defined conduct and is thus not unconstitutionally vague or ambiguous and that it does not require a defendant to speculate as to its meaning.

I support of his claim that the statute is overbroad, the defendant argues that the definition of nudity in Section 31 of the statute is "so vast as to include many common everyday

occurrences including "a person taking a picture of his nude baby on a bear skin rug" and 'a child running up and down the beach on a summer day.'"

"The traditional rule is that a person to whom a statute may constitutionally be applied may not challenge the statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court." New York v. Ferber, 485 U.S. 747, 767 (1981).

The courts have applied on exception to this rule and have allowed persons to attack overly broad statutes, even though the alleged conduct of the person making the attack is clearly unprotected, in certain cases where persons whose freedom of expression is constitutionally protected "may well

refrain from exercising their rights for fear of criminal sanctions by a statute susceptible of application to protected expression" New York v. Ferber, supra at 768. This exception has been applied with hesitation, however, and courts have "insisted that the overbreath involved be 'substantial' before the statute involved will be invalidated on its face" New York v. Ferber, supra at 769.

Such is not the case here. Section 31 of G.L. c. 272 defines nudity as:

> uncovered or less than opaquely covered post-pubertal human genitals, pubic areas, the post-pubertal human female breast below a point immediately above the top of the areola, or the covered male genitals in a discernibly turgid state.

Applying this definition of nudity, the scenarios represented the defendant

could not result in a conviction under the statute.

I find therefore that the statute is not unconstitutionally broad.

The defendant also argues that, because the statute could include the previously mentioned potential situations, "enforcement, as done in the instant case is a denial of equal protection." The statute specifically excludes pre-pubescent children. There is no merit therefore to an argument that enforcement of the statute against the defendant, while failing to enforce the statute in situations involving pre-pubescent children, is a denial of equal protection.

II. Adequacy of the Indictment

The defendant contends that the indictment is defective and must be

dismissed because the word "knowingly" was omitted and because a comma was placed after the word nudity, thus eliminating from the indictment the element of the offense "for the purpose of visual representation or reproduction in any book, motion picture, film photograph or picture."

General Laws Chapter 277, Section 34 provides:

> An indictment shall not be dismissed or considered defective or insufficient if it is sufficient to enable the defendant to understand the charge and to prepare his defense, nor shall it be considered defective or insufficient for lack of any description or information which might be obtained by requiring a bill of particulars.

The indictment in this case tracks the exact language of the statute. The inclusion of the comma after the word

nudity appears to be a typographical error. While the misplaced comma could lead to a faulty reading of the necessary elements of the offense, the defendant has not been prejudiced in his defense thereby. The facts alleged against him include that he posed his fifteen year old stepdaughter in a state of nudity and took photographs of her, and that ten of the photographs taken have been recovered. The facts alleged therefore cover the three necessary elements of an offense including that the defendant posed his stepdaughter "for the purpose of visual representation or reproduction in a photograph." The defendant has been aware of this and has had the opportunity to prepare his defense accordingly. Similarly, the absence of

the work "knowingly" before the word "permit" in the indictment is of no consequence given the facts of this case and has resulted in no prejudice to the defendant.

I find therefore, that the defect in the indictment was immaterial and therefore does not require a dismissal of the indictment.

ORDER

It is hereby Ordered that the defendant's Motion to Dismiss be Denied.

Robert V. Mulkern
Justice of the
Superior Court

DATED: July 11, 1985